(1)

91-228

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARK BURRIS; LOUISE GRIDER; and LILLA SMYTHE,
Petitioners,

vs.

FIRST FINANCIAL CORPORATION; and
HOME OWNERS FUNDING CORPORATION OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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DATED: August 5, 1991

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QUESTIONS PRESENTED FOR REVIEW

Congress has enacted three different statutes relevant to this case which deal with the federal preemption of state anti-usury provisions—one dealing with Veteran's Administration ("VA") insured or guaranteed loans, one dealing with Federal Housing Administration ("FHA") insured loans, and one under the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). By meeting certain federal statutory requirements, lenders are able to charge interest rates which would otherwise be usurious under state law. However, under the federal statutes states may override these federal preemptions by taking certain actions. Against this background, the questions presented for review are as follows:

1. Whether an amendment to the Arkansas Constitution overriding federal preemption may be interpreted in a manner contrary to the interpretation given to it by the Arkansas Supreme Court.

2. Whether the consumer protection provisions of DIDMCA may be interpreted in such a manner as to make their protective provisions illusory and ineffective.

3. Whether the Court of Appeals may rely upon counsel's unsworn statements of facts presented for the first time during oral argument or in briefs before the Court of Appeals to resolve disputed issues of fact not resolved by the District Court and thereby uphold a summary dismissal.

PARTIES

The parties to the proceeding before the United States Court of Appeals for the Eighth Circuit are listed below.

Mark Burris
Louise Grider
Lilla Smythe
First Financial Corporation
Home Owners Funding Corporation of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Regulations:

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mark Burris, Louise Grider, and Lilla Smythe (hereinafter "Petitioners" or "Plaintiffs") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 20, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached at Appendix, p. A-9, and is reported at 928 F.2d 797. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, is attached at Appendix, p. A-1, and is reported at 733 F. Supp. 1270.

JURISDICTION

An opinion was entered by the United States Court of Appeals for the Eighth Circuit on March 20, 1991. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed April 3, 1991. On May 7, 1991, an Order was entered denying the Petition for Rehearing with Suggestion for Rehearing En Banc.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254, which governs review of cases from the Courts of Appeals.

STATUTORY PROVISIONS INVOLVED*

Statutes:

12 U.S.C. § 1735f-5

12 U.S.C. § 1735f-7

12 U.S.C. § 1735f-7 (note) - Depository Institutions Deregulation and Monetary Control Act of 1980

38 U.S.C. § 1828

Ark. Const., Ark. 19 § 13 (Amendment 60 of 1982)

Ark. Code Ann. § 18-40-104

Regulations:

12 C.F.R. § 590.4

24 C.F.R. § 201.17

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*Pertinent text is set forth in the Appendix at pp. A-26 to A-45.

STATEMENT OF THE CASE

Petitioner Mark Burris purchased a mobile home from and entered into a retail installment sales contract with Smoot Mobile Home Sales of Marmaduke, Arkansas on May 23, 1984. The installment sales contract was on a form contract prepared by First Financial Corporation ("FFC") and was assigned to FFC. It was guaranteed by the Veterans Administration ("VA"). The contract was subsequently transferred to Home Owners Funding Corporation of America ("HOFCA") (FFC and HOFCA are collectively referred to as "Respondents" or "Defendants") for servicing and other purposes. It is undisputed that the contract provided for an interest rate in excess of the Arkansas usury limit, initially (15.539%) and after a subsequent refinancing (13.5%).

On June 30, 1988, Burris filed a Complaint — Class Action in the District Court for the Eastern District of Arkansas, Western Division. Burris alleged that FFC and HOFCA had charged and were charging Burris and other members of the putative class finance charges in excess of those permitted by Arkansas law. Burris further alleged that such charges did not qualify for federal preemption. HOFCA answered, denying the allegations, and moved for dismissal or in the alternative for summary judgment. FFC moved to dismiss the Complaint.

The Complaint was amended on March 24, 1989, to add additional plaintiffs Louise Grider and Lilla Smythe, and again amended on October 13, 1989. HOFCA and FFC renewed their motions each time. Petitioners filed their case as a class action, seeking to represent themselves and other numerous parties similarly situated.

Petitioners Smythe and Grider also purchased mobile homes and entered into retail installment contracts on form contracts prepared by FFC. Grider entered into a purchase agreement and retail installment sales contract with Lochridge Homes, Inc. of

North Little Rock, Arkansas on June 17, 1985. Smythe entered into a manufactured home retail installment sales contract with Crews Mobile Homes of Jacksonville, Arkansas on September 16, 1985. These contracts were assigned to FFC, but were not insured or guaranteed by the VA or Federal Housing Administration ("FHA") and were not transferred to HOFCA. The Smythe and Grider contracts also provided for interest rates in excess of the Arkansas usury limit.

On March 22, 1990, the District Court entered an Order[1] granting summary judgment and dismissing the claims of Burris against HOFCA and FFC in which it determined that the Arkansas usury limit was preempted by provisions of federal law applicable to VA guaranteed loans and that such preemption had not been overridden by Arkansas' subsequent adopted of Amendment 60 to its Constitution. The District Court also dismissed the claims of Grider and Smythe against FFC, holding that the contracts complied with the provisions of DIDMCA and therefore qualified for federal preemption.

Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 as plaintiffs and defendants were residents of different states and the amount in controversy exceeded the jurisdictional threshold. Jurisdiction was also invoked under 28 U.S.C. § 1331 for the claims arising under 18 U.S.C. § 1961, *et. seq.*

A timely appeal in the United States Court of Appeals for the Eighth Circuit was filed by Burris, Grider, and Smythe on April 23, 1990. The case was briefed and oral argument was held on January 10, 1991. On March 20, 1991, the Court of Appeals affirmed the District Court Order.[2] The Court held that (1) Arkansas' adoption of Amendment 60 in 1982 did not override FHA/VA preemption provisions; (2) the contracts complied

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[1] 733 F. Supp. 1270.

[2] 928 F.2d 797.

with DIDMCA provisions; and (3) defendants' motions to dismiss and motion for summary judgment were properly granted.

A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed by Petitioners on April 3, 1991. This Petition was denied by an order entered May 7, 1991.

ARGUMENT

a. The Decision of the United States Court of Appeals for the Eighth Circuit Conflicts with a Decision of the Arkansas Supreme Court.

In 12 U.S.C. § 1735f-7(a) Congress preempted any state limitations on interest rates that could be charged on FHA insured loans. Subsection (b) of the same statute provides that the federal preemption will be effective only "until the effective date (after the date of enactment of this section [enacted December 21, 1979]) of a provision of law of that state limiting the rate or amount of interest . . . on any such loan . . . ." Under 38 U.S.C. § 1828, VA insured or guaranteed loans are exempt from state usury limits to the same extent FHA loans are exempt.

Amendment 60 to the Arkansas Constitution adopted in 1982 provided for an interest or usury limit on "any contract" providing for interest charges. In *Bishop v. Linkway Stores, Inc.*, 280 Ark. 106, 110, 655 S.W.2d 426, 419 (1983), the Arkansas Supreme Court held that the "word 'any' means exactly what it says." Thus both FHA and VA loan contracts made in Arkansas come within the operation of the new state usury limit, and the federal preemption with respect to contracts such as the Burris loan have been overridden by state law pursuant to the provisions of the federal statute.

In its holding to the contrary, the Eighth Circuit states that Petitioner Burris, "in essence, ignores the remainder of Amendment 60," 928 F.2d at 800, A-12, referring to subsection (d)(ii) of Amendment 60 that states the provisions of Amendment 60 are not intended to supersede or "invalidate any provisions of federal law applicable to loans or interest rates." However, it was the Eighth Circuit that ignored the holding in *Bishop*, for the necessary result of that holding was to render the provisions of subsection (d) ineffectual as pointed out in the dissenting opin-

ion in *Bishop*, quoting with approval from the trial judge who ruled against the plaintiff and was reversed on appeal:

> If, as Plaintiff urges, [i.e., and as the Arkansas Supreme Court held], the word "any" means "all", the result is further conflict with the two types of lending categories identified in [subsection (d)]. . . . [T]hey are lending transactions, and would be included within the meaning of the word "all", as Plaintiff attempts to apply it.

280 Ark. at 113, 655 S.W.2d at 430.

It is submitted that the Eighth Circuit decision is in direct conflict with the decision of the Arkansas Supreme Court on an important matter of Arkansas law. The decision of the Arkansas Supreme Court in *Bishop* was not recognized or distinguished by the Eighth Circuit, not even being cited in its opinion, and the Eighth Circuit's decision cannot be reconciled with the holding in *Bishop*.

The Eighth Circuit's citation of *In Re Lawson Square, Inc.*, 816 F.2d 1236 (8th Cir. 1987), as a reason for ruling against Petitioners on the question of the override of FHA/VA preemption is misplaced. A holding in favor of Petitioners would be entirely consistent with that court's holding in *Lawson Square*, which dealt with the question of override of preemption under DIDMCA. However, this case involves FHA/VA preemption and the requirement to override DIDMCA preemption is markedly different from the requirement to override FHA/VA preemption provisions. A state which desires to override DIDMCA must include an explicit affirmative statement to this effect. DIDMCA § 501(b)(2), A-31-32. Even without subsection (d), Amendment 60 would not have overridden DIDMCA preemption because the affirmative statement of its intent to do so is not present. To the contrary, and as applicable to this case, a state which desires to override FHA/VA preemption need only pass an act limiting interest rates on such contracts, and according to

the decision in *Bishop* Arkansas has done so. Whether it also makes a statement of intention to override or not override is irrelevant. The Eighth Circuit ruled that since Amendment 60 stated at one point that it was not intended to supersede federal law on certain loans, the reasoning of *Lawson Square* "is equally applicable to FHA and VA preemption statutes." 928 F.2d at 801; A-13. This statement ignores the fundamental differences between the state override provisions of DIDMCA and FHA/VA preemption.

Petitioners submit that the decision below is so clearly wrong that a summary reversal on this point under Sup. Ct. R. 16.1 and remand to the District Court for further proceedings on Petitioners' class action claims is the most appropriate action for the Court to make.

b. The Decision of the United States Court of Appeals for the Eighth Circuit decides an important question of federal law which has not been, but should be, settled by this Court.

The Eighth Circuit has virtually read out of the law the consumer protection provisions of DIDMCA. Its decision is so plainly wrong that summary reversal on the merits by the Court is appropriate. Under any reasonable construction of DIDMCA and its implementing regulation the contracts in question failed to comply with the requirements for preemption in several respects. However, failure to comply with only one requirement disqualifies a contract for preemption.

The loans of Petitioners Grider and Smythe are neither FHA nor VA loans and the only federal preemption that could apply to their interest rates is that of DIDMCA. However, to qualify for DIDMCA preemption the terms of a loan must contain substantial consumer protection provisions, both those stated in the statute and those adopted by the Federal Home Loan Bank

Board. DIDMCA, subsection 501(c), A-30-31; 12 C.F.R. § 590.4, A-38. Contrary to the Eighth Circuit's holding, those safeguards are missing from Petitioners' loan contracts and the safeguards have been effectively read out of the statute.

The Eighth Circuit held in Section III that "[d]efendants have no obligation to inform plaintiffs that they can pay off the loan in part without penalty. Defendants need only tell plaintiffs that they can prepay the loan." 928 F.2d at 804; A-20. This is not a correct statement of DIDMCA's requirement. The opinion then erroneously holds that the contracts in question comply with DIDMCA.

It is important to note the following relevant language.

DIDMCA's Requirement, 12 C.F.R. (§ 590.4(d))	Eighth Circuit's Decision (928 F.2d at 804; A-20)
A debtor may prepay *in full or in part* the unpaid balance of the loan at any time without penalty. *The right to prepay shall be disclosed* in the loan contract . . . . (Emphasis added)	It [12 C.F.R. § 590.4(d)] does *not* specify that the right to repay in full or in part must be specified. (Emphasis added)

The Eighth Circuit's statement is plainly in conflict with the regulation. The only reasonably meaning that can be ascribed to "the right to prepay" that must be disclosed is the antecedent right to prepay *in full or in part*. The regulation recognizes that there are two distinct types of prepayment, full and partial, and clearly requires that the right to do *either* be disclosed. The clear implication in the present contractual provision that only allows a debtor to "prepay the unpaid balance of this contract *in full*" is that the debtor may *not* prepay in part, contrary to the Eighth Circuit's holding.

Petitioners submit that it is appropriate for the Court to make a summary disposition on the merits under Sup. Ct. R. 16.1 holding that the contracts do not disclose the right to prepay in full or in part as required by DIDMCA and thus are disqualified for federal preemption.

The loan contracts also impose a prepayment penalty in the form of an acquisition charge. The prepayment clause of each Petitioner's contract provides:

> Debtor may prepay the unpaid balance of this contract in full at any time without penalty, and upon such payment, acceleration, refinancing or consolidation, Debtor shall receive a refund credit calculated pursuant to the "actuarial method" *after first deducting an acquisition charge of $50.00 in the event of a prepayment.* (Emphasis added)

However, 12 C.F.R. § 590.4(d) flatly requires that a debtor be allowed to prepay *without penalty.* The prepayment clause stating that prepayment is without penalty is illusory, for the same sentence goes on to impose a $50.00 charge payable *only* upon prepayment. Despite the deceptively clever wording the acquisition charge is clearly a penalty, for it is "a charge imposed at the time of prepayment that would not be imposed if the note were paid at maturity instead of at an earlier date." *Goldman v. First Federal Savings and Loan Association of Wilmette*, 518 F.2d 1247, 1252 (7th Cir. 1975).

The Eighth Circuit's characterization of the acquisition charge as a "handling charge" for costs associated with releasing the lien on the manufactured home is specious. The acquisition or "handling" charge is only imposed upon prepayment, but under Arkansas law, Ark. Code Ann. § 18-40-104, the lien *must* also be released if the loan is paid at maturity. In any event, the characterization as a handling charge directly contradicts the language of the contract and was presented to the Court of Appeals for the first time on appeal, is unsupported by any

factual evidence and at the least is a disputed issue of fact never resolved by the District Court.

The Eighth Circuit opinion also erroneously relied on the FHA regulation contained in 24 C.F.R. § 201.17. 982 F.2d at 804; A-21. Although it is true that the Federal Home Loan Bank Board could look for guidance to FHA regulations in adopting regulations under DIDMCA, 928 F.2d at 804-05 n.10, A-21, the regulation adopted expressly prohibited prepayment penalties. 12 C.F.R. § 590.4(d), A-41. FHA regulations in 24 C.F.R. § 201.17 do *not* prohibit prepayment penalties. A-45. The "handling charge" in this case is a prepayment penalty as it is imposed, *by contract*, *only* at prepayment and not at maturity; there is *no* evidence in the record to dispute these plain and unambiguous terms of the contract. Even if there were, the terms of the contract govern. The acquisition charge *cannot* be imposed at maturity because FFC has no contractual right to collect the charge at maturity, only upon prepayment. As a prepayment penalty, the acquisition charge can therefore be allowed under FHA regulations but *not* under DIDMCA. The Eighth Circuit thus erred in its reliance on FHA regulations. The contract before the Court is not an FHA contract and is no way governed by FHA regulations. It clearly imposed a prepayment penalty and is thus ineligible for DIDMCA preemption.

Petitioners submit that it is also appropriate for the Court to summarily reverse and remand on this point by holding that the acquisition charge is a prepayment penalty as a legal matter of contract interpretation. Alternatively, a summary reversal and remand to the District Court for resolution as a disputed factual matter would be proper.

The Eighth Circuit erred in holding that the actual practice of FFC with respect to the notices of default actually given were inapposite to a determination of whether the contracts are eligible for preemption. 928 F.2d at 803; A-19. The DIDMCA

regulations require that certain provisions be stated in the written contracts, 12 C.F.R. § 590.4, but further require that certain practices be followed. This was recognized by the court in *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir.), *reh'g en banc granted*, 727 F.2d 1072 (1984), *reinstated en banc*, 764 F.2d 1400 (1985), *cert. denied*, 476 U.S. 1124 (1986), when it said, "[t]he words 'no action . . . may be taken' regulate the *conduct* of creditors attempting to exercise their rights upon default, not the written financing agreements themselves." (Emphasis added) 727 F.2d at 1070. Of necessity, whether a lender has followed those required practices is a question of fact, and failure to follow the required practices disqualifies the contracts for DIDMCA preemption. Petitioners alleged in their complaint that FFC had violated those requirements and attached copies of notices sent by FFC to Petitioner Grider to support these allegations, which notices were taken into consideration by the District Court. 733 F. Supp. at 1275 n.2, A-8. There was no trial in this case. FFC submitted *no evidence*, affidavit or otherwise, in support of its motion to dismiss to contradict these factually supported allegations. To uphold the dismissal of the complaint without any factual proof to refute the allegations of the complaint and Petitioners' proof is simply wrong. The determination of such factual matters should properly be reserved for a full trial on the merits as opposed to summary dismissal having no factual support.

The opinion also conflicts with established Eighth Circuit law in its holding on the propriety of summary judgment. The Eighth Circuit stated that "[a]llegations do not rise to an issue as to a material fact." 928 F.2d at 805-06; A-23. However, Petitioners submitted a well-pleaded complaint supported by factual allegations, not mere conclusory statements. The Complaint thus stated a claim for relief. *Kaylor v. Fields*, 661 F.2d 1177, 1183 (8th Cir. 1981); *Stanturf v. Sipes*, 335 F.2d 224, 229 (8th Cir. 1964). In addition, Petitioners were not obliged to submit

affidavits in response to FFC's motion as FFC offered no affidavits and no other evidence except attachment of certain notices it claimed contradicted the notices of default presented by Petitioners, thereby raising an issue of fact as to the effect of the notices sent. While Rule 56(c) of the Federal Rules of Civil Procedure states that a party opposing a motion "may serve" opposing affidavits, FFC failed to demonstrate the absence of any material fact issue as to the contracts or its conduct, as was its burden. Absent factual evidence, further submissions by the Petitioners were unnecessary. *Lundeen v. Cordner*, 356 F.2d 169, 170 (8th Cir. 1966). Therefore, although mere conclusory allegations may not create an issue of material fact, Petitioners' pleadings went beyond conclusory allegations and asserted issues of fact.

Petitioners alleged that certain actions of Respondents with respect to Petitioners' loans were contrary to the requirements of DIDMCA and thereby disqualified their loans for DIDMCA preemption. Respondents offered no proof to the contrary, simply denying the allegations and their relevance. The Eighth Circuit dismissed these allegations by stating the contracts themselves were not violative of DIDMCA, 928 F.2d at 806, A-23; thus conduct was immaterial and not addressed, and no issue as to any material fact existed. However, Respondent FFC inadvertently acknowledged the materiality of conduct by discussing it in its brief (whether Respondents "actually imposed" any prepayment penalties or "assessed" the acquisition charge upon partial prepayment) and the Eighth Circuit itself also indicated that conduct *was* material when it addressed the provisions on prepayment penalties. 928 F.2d at 804 n.9; A-20-21 (the handling charge was "never assessed" for partial payments). The only "proof" of such fact relied on by the Eighth Circuit was counsel's statement during oral argument. These facts are material as they are "disputed facts . . . which, under the substantive laws governing the issue, might affect the outcome

of the suit." *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989). As the opinion relied on these statements by the Respondents which were unsupported by any evidence in the record and relied on other instances of conduct, it clearly was a material fact issue. Since there was no evidence or even argument before the District Court that supports the Eighth Circuit's holdings, genuine issues of material fact exist and summary judgment was improper. *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 389 (8th Cir. 1969).

Again, summary reversal by this Court and remand to the District Court to resolve the factual disputes is clearly warranted.

c. The Decision of the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Eighth Circuit's reasoning on the right to prepay conflicts with its subsequent acceptance of the statement of Respondent FFC's attorney at oral argument as *unsworn, factual evidence* that the \$50.00 charge imposed at prepayment was never assessed for partial prepayments. *If* this statement is true, then it proves that the right of prepayment disclosed in the contract is solely the right to prepay in full, for the \$50.00 charge is plainly applicable to all prepayments allowed by the contract.

The Eighth Circuit also erroneously held that the \$50.00 acquisition charge imposed in Paragraph 9 of the contracts upon prepayment and *only* upon prepayment is not a prepayment penalty prohibited by DIDMCA in 12 C.F.R. § 590.4(d). 928 F.2d at 804; A-21. This holding is based on evidence not before the District Court or Eighth Circuit and thus violates settled federal and state law.

The Eighth Circuit states the following:

> At oral argument, defendant's attorney assured the court that the $50.00 handling charge was never assessed for partial payments . . . . Defendants state that "handling charge" is for costs associated with releasing the lien on the manufactured home securing the loan.

928 F.2d at 804 n.9, 804; A-20-21. There is absolutely *no evidence* in the record on either of these points and Respondents never cited to any such evidence in their briefs or otherwise. In fact, the opinion clearly states that it was the Respondent's *attorney,* not a witness, which assured the court *at oral argument*, not in the District Court proceedings, concerning the acquisition charge.

Indeed, the Eighth Circuit accepted Respondent's assertion that the acquisition charge of $50.00 is a "handling charge for the costs associated with releasing the lien on the manufactured home securing the loan." 928 F.2d at 804; A-20. This was an afterthought created solely for this appeal. FFC did *not* raise this issue before the District Court, as pointed out in Petitioners' reply brief at the Eighth Circuit. There is *nothing in the record*, either by affidavit or argument, to support this totally new contention that the Eighth Circuit accepted without question. Surely Petitioners are as entitled as FFC to the benefit of the clear requirement of the law that new issues cannot be raised on appeal. The matter is made the more egregious by the fact that this appeal is from a ruling on a motion to dismiss which was not supported by any affidavit or other factual evidence to support FFC's new assertion of "handling charges", nor were Petitioners given the opportunity to test such assertion by cross examination, discovery of contrary evidence, argument, or otherwise. The "handling charge" may never have been imposed upon a partial prepayment because there has never been a partial prepayment. Without proper trial, the Court will never know.

The Eighth Circuit's necessary reliance on the factual statements of counsel to resolve the factual matters demonstrates a totally deficient record and is eloquent proof that there are disputed issues of fact that should be resolved by the District Court.

The law is well settled that an appeals court does not consider newly raised issues for the first time. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Lacy v. Lockhart*, 697 F.2d 271, 272 (8th Cir.), *cert. denied*, 461 U.S. 917 (1983). Neither does it try cases de novo. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). The Eighth Circuit recognized this rule when it stated earlier, "[h]aving failed to raise the issue before the district court, plaintiffs cannot raise the issue for the first time on appeal." 928 F.2d at 803, citing *Grant v. General Electric Credit Corp.*, 764 F.2d 1404, 1409 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986); A-19.[3] By relying on evidence not in the record and allowing Respondent's attorney to testify, the Eighth Circuit's decision conflicts directly with the aforementioned cases, as well as its own application of the rule in its opinion.

To allow a party to raise new factual allegations and issues not before the trial court at oral argument on appeal, and to *accept* such mere allegations as proven facts, deprives the Petitioners of their basic right to due process of law to confront such issues.

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[3] The Eighth Circuit at that point addresses another issue and states:

> Plaintiffs additionally assert that they did not intend that the contracts be governed by DIDMCA. Nowhere in any of the pleadings or materials submitted to the district court is there any statement by plaintiffs that they did not intend their contracts to be governed by DIDMA.

928 F.2d at 803; A-19. The Eighth Circuit at this point correctly recognized that new evidence and issues could not be raised at the appellate level, but then violated this standard when it allowed Defendant FFC and its attorney to offer new evidence and issues which it relied on later in the opinion.

The judgment under review was not based upon such facts since Respondents did not present such facts to the trial court. If the order under review *had* been based on such facts, their absence from the record would have rendered the order clearly erroneous.

The Eighth Circuit has demonstrated an unseemly hostility to the consumer protection safeguards mandated by Congress in DIDMCA and its accompanying regulations, even to the point of violating a rule of law simultaneously used to refute a portion of Petitioners' arguments. To specifically recite and rely upon as proven facts the unsworn statements of counsel voiced for the first time during oral argument on appeal is simply inexcusable. Such were the lengths to which it was necessary for the court to go to deny Petitioners their right to present their case. These departures from acceptable procedures plainly call for this Court to correct them.

The Court should summarily hold that the Eighth Circuit erred in allowing and relying on such unsworn evidence and reverse and remand to the District Court.

CONCLUSION

For all the reasons set forth herein, Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit. Petitioners submit that it is appropriate for this Court to make a summary disposition on the merits pursuant to Sup. Ct. R. 16.1 and reverse and remand the case to the District Court for resolution of any remaining issues, including Petitioners' class action claims.

Respectfully submitted,

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DATED: August 5, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR-C-88-446

MARK BURRIS, LOUISE GRIDER
and LILLA SMYTHE
PLAINTIFFS

V.

FIRST FINANCIAL CORPORATION
and HOME OWNERS FUNDING
CORPORATION OF AMERICA
DEFENDANTS

Filed: Mar. 22, 1990

ORDER

Before the Court are the Motion to Dismiss of defendant First Financial Corporation ("First Financial") and the Motion to Dismiss or in the Alternative for Summary Judgment of defendant Home Owners Funding Corporation of America ("HOFCA"), to both of which plaintiffs have responded. The Court will dispose of both motions and any supplements thereto in this Order.

Plaintiffs are persons who have entered into mobile home retail installment sales contracts in which one or both of the defendants allegedly have an interest. In their complaint, Plaintiffs contend that under the law of the State of Arkansas, which they assert is controlling herein, the rate of interest charged by defendants on these sales contracts is usurious. Plaintiffs seek money damages from defendants and certain other declaratory relief on behalf of themselves and all others similarly situated.

Defendants deny that Arkansas law governs the rate of interest which may be lawfully charged on the installment sales contracts in question. They contend that with respect to these contracts Arkansas law is preempted by the Veterans Administration ("VA") and Farmers Home Administration ("FHA") preemption statutes, 38 U.S.C. §1828 and 12 U.S.C §1735f-7, and section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), Public Law 96-221, March 31, 1980 and 12 C.F.R. 590.4 *et seq.*, one or more of which defendants claim apply herein. Plaintiff Burris has a VA guaranteed loan, while plaintiffs Grider and Smythe have conventional loans. On account of the difference in the character of these loans, the Court must address them separately in determining the merits of defendants' motions.

On May 23, 1984, Burris entered into a mobile home retail installment sales contract with Smoot Mobile Home Sales. The contract was apparently prepared by and later assigned to defendant First Financial, who subsequently assigned it to Government National Mortgage Association ("GNMA"). Still later, GNMA contracted with defendant HOFCA to service the contract.

The rate of interest chargeable on VA loans is governed by certain federal laws related thereto, among them 38 U.S.C. §1828, which in essence provides that if loans insured under Title I and Title II of the National Housing Act are exempt from state usury limits, then loans guaranteed under 38 U.S.C. §§1801 *et seq.* are also exempt from such provisions. As reflected in 12 U.S.C. §1703, Title I of the National Housing Act includes mobile home loans within the class of insurable loans. Thus, pursuant to §1828, defendants are at first blush entitled to invoke federal preemption of Arkansas' usury limits with respect to the interest charged on Burris' loan. The Court must look further to ascertain if any other federal or state law, or a combination thereof, strips the cloak of federal preemption from Burris' loan.

The legislative history reveals that Congress passed the VA and FHA preemption statutes cited above in late 1979 to address problems with the availability of government insured loans brought on by high market interest rates and low state usury limits. *See* S. Rep. No. 260, 96th Cong., 1st Sess. 30, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1916. However, under both the VA and the FHA exemption provisions, "the State's right to set an interest-rate limitation that overrides the Federal exemption would be preserved." S. Rep. No. 260, *supra,* at 31, 1979 U.S. Code Cong. & LAd. News at 1917. To address the desire for a coordinated Federal policy in this area, the VA statutory scheme provides that any state override of the exemption for FHA loans will also override the exemption for VA loans. Under the FHA provision, the federal exemption "shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage or advance." 12 U.S.C. §1735f-7(b).

Within four months of the passage of the VA and FHA exemptions, Congress enacted section 501 of DIDMCA (codified as amended at 12 U.S.C. §1735f-7 note), yet another federal preemption provision. This statute is of a much broader scope than the VA and FHA provisions, applying not only to federally insured loans but to all home loans, including conventional loans, which are in some manner "federally related," as that term is broadly defined in section 501. In order for the DIDMCA exemption to apply to mobile home financing, with which we are concerned here, the financing contract must contain certain consumer protection provisions specified in Federal Home Loan Bank Board ("FHLBB") regulations.[1]

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[1] These include, *inter alia*, late charges only when a payment is 15 days late, and 30 days notice before acceleration or foreclosure.

In 1982, the State of Arkansas adopted Amendment 60 to the Arkansas Constitution (now found at Ark. Const. Art. 19, §13), which provides that "[t]he maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract." Ark. Const. Art. 19, §13(a)(i). However, the amendment also states that "[t]he provisions hereof are not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property." Ark. Const. Art. 19, §13(d)(ii).

Plaintiff Burris contends that none of the federal preemption provisions are available to defendants with respect to his loan. Burris claims that the VA exemption provision does not apply to his financing contract because of Arkansas' adoption of Amendment 60, which limits the maximum lawful rate of interest which may be charged on any contract, subsequent to the enactment of 12 U.S.C. §1735f-7(b). Burris argues that override of the exemption is automatic upon a state's passage of any law limiting interest rates and that the provision in Amendment 60 that no federal provisions should be deemed invalidated by the amendment is, thus, without any legal significance as to the issues herein. Burris also contends that in light of the enactment of the DIDMCA exemption subsequent to the FHA and VA provisions, defendants must have complied with all of the DIDMCA requirements with respect to his financing contract in order for any of the federal exemptions to apply.

In response, defendants correctly assert that by its express terms Amendment 60 does not override or invalidate the FHA or VA preemption provisions. Defendants cite the case of *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986), *cert. denied*, 484 U.S. 926 (1987), in support of their position. In *Doyle*, the court heard consolidated actions in which FHA and VA-insured mobile home agreements were challenged as usuri-

ous. In finding that the FHA and VA exemptions were overridden by the State of Georgia's amendment of its usury limits on mobile home transactions, the Eleventh Circuit stated that "given Congress' deference to states' rights to fix their own usury law, . . . when a state reenacts or raises its usury limit on a particular class of loans, it overrides the FHA and VA preemptions for that type of loan in the absence of a contrary statement." *Doyle,* 795 F.2d at 914.

In reliance upon *Doyle,* defendants argue that a different result should obtain here because of the inclusion of the express provision in Amendment 60 that no federal law applicable to loans or interest rates should be deemed superseded or invalidated by any other provision therein. Although noting that there is some overlap among DIDMCA and the FHA and VA preemptions, the Eleventh Circuit also found that "FHA or VA lenders may obtain federal preemption under the respective FHA or VA preemption without also satisfying the DIDMCA requirements." *Doyle,* 795 F.2d at 911.

After careful consideration, the Court finds that the FHA and VA exemptions were not overridden by Arkansas' adoption of Amendment 60 in 1982. By its express terms, the amendment was not intended to "supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property." Thus, Arkansas chose not to reassert a limit on the rate or amount of interest which could lawfully be charged on the class of loans and mortgages covered by the FHA and VA exemptions. The automatic override urged by Burris simply did not occur. This Court is not going to engage in a strained, mechanical and, in the Court's view, flawed interpretation of the law which would undermine the clear intent of the State of Arkansas in adopting Amendment 60. Such an approach would also run counter to the acknowledged deference of Congress to states' rights to fix their own usury law.

Nor does the Court find any merit in Burris' argument that defendants must have complied with all of the DIDMCA requirements in order to avail themselves of any of the federal exemptions. The Eleventh Circuit stated in *Doyle:*

> At the time the FHA and VA preemptions were enacted, DIDMCA was well through the congressional committee process. It simply defied reason that Congress would enact one preemption if it were considering a second preemption which would render the first meaningless. This Court holds that a lender entitled to preemption under the FHA or VA statutes need not comply with the DIDMCA regulations.

795 F.2d at 912. This Court hereby adopts both the reasoning and the holding of the Eleventh Circuit in *Doyle* with respect to this issue.

Based upon all of the foregoing, the court finds that defendants' motions to dismiss the claims of plaintiff Burris should be, and they are hereby granted. Burris' claims against defendants shall be dismissed. The Court will now turn to the claims of plaintiffs Grider and Smythe.

On June 17, 1985, Grider entered into a purchase agreement and mobile home retail installment sales contract with Lochridge Mobile Homes. The contract was in large measure prepared by and was subsequently assigned to First Financial. On September 16, 1985, Smythe entered into a mobile home retail installment sales contract with Crews Mobile Homes. Her contract, too, was in large measure prepared by and was subsequently assigned to First Financial. In their Second Amended Complaint, plaintiffs allege that both of these contracts were ultimately transferred or assigned to or serviced by HOFCA.

In response, however, HOFCA asserts through the supplemental affidavit of Stephen W. Leon, its Senior Vice President, Government Programs and Administration, that it has "never

serviced, owned, held or received an assignment or transfer of the retail installment contracts of Louise Grider and Lillas Smythe." Plaintiffs admit in their response to the supplemental affidavit that they have no information to contradict this assertion. It is, thus, clear that defendant HOFCA is entitled to judgment as a matter of law upon the claims of Grider and Smythe. HOFCA's motion for summary judgment upon the claims of Grider and Smythe should be, and it is hereby, granted.

As noted previously, Grider and Smythe have conventional loans with defendant First Financial. In response to plaintiffs' claims that these loans as written are usurious under Arkansas law, First Financial asserts that Arkansas law does not govern these transactions and that it is protected by the federal preemption provided in section 501 of DIDMCA. Plaintiffs, however argue that First Financial may not rely upon section 501 due to its failure in its contracts to comply with all DIDMCA "consumer protection" requirements, including, but not limited to, provisions as to prepayment, late payments, defaults, cure, acceleration of the balance due, and foreclosure. First Financial denies plaintiffs' claims that its contracts are not in compliance with DIDMCA.

The Court has carefully considered all of plaintiffs' claims concerning the alleged deficiencies in First Financial's contracts and First Financial's responses thereto. First Financial has cited several cases from the Eleventh Circuit in which most of these issues were addressed. *See Quiller v. Barclays American/ Credit, Inc.,* 727 F.2d 1067 (11th Cir. 1984), *rehearing en banc granted,* 727 F.2d 1072 (1984), *restated en banc,* 764 F.2d 1400 (1985), *cert. denied,* 476 U.S. 1124 (1986); *Grant v. General Electric Credit Corp.,* 764 F.2d 1404 (11th Cir. 1985) *en banc, cert. denied* 476 U.S. 1124 (1986); *Moyer v. Citicorp Homeowners, Inc.,* 799 F.2d 1445 (11th Cir. 1986). The Court finds considerable precedential value in these cases. In light of the Court's decision to follow the holdings in these cases and the

Court's determination that First Financial's arguments in its supplemental brief filed November 13, 1989 are persuasive on all issues presented with respect to the DIDMCA requirements, the Court is of the opinion that a lengthy analysis and discussion of these issues would serve no useful purpose herein. Suffice it to say that after careful review the Court finds that the contracts in question are not violative of the DIDMCA requirements and that First Financial is entitled to rely upon the preemption provided in section 501. It must follow, then, that plaintiffs Grider and Smythe have stated no legally cognizable claims against First Financial. Accordingly, first Financial's motion to dismiss the claims of Grider and Smythe should be, and it is hereby, granted.[2]

Inasmuch as the Court has found that neither Burris, Grider nor Smythe has a cognizable individual claim for relief against either HOFCA or First Financial, none of them may serve as a class representative in a class action suit. *See O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *McArthur v. Camelot Inn,* 513 F. Supp. 343 (E.D. Ark. 1980) Thus, this matter shall be dismissed in its entirety.

DATED this 22nd day of March, 1990.

/s/ Elsijane T. Roy
UNITED STATES
DISTRICT JUDGE

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[2] To the extent that the Court has relied upon the contracts or other materials outside the pleadings, the Court has considered this a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. All parties have been given a reasonable opportunity to present all materials pertinent to this motion.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 90-1677EA

MARK BURRIS, LOUISE GRIDER,
and LILLA SMYTHE,
Appellants,

v.

FIRST FINANCIAL CORPORATION,
and HOME OWNERS FUNDING
CORPORATION OF AMERICA,
Appellee.

Appeal from the United States
District Court for the Eastern
District of Arkansas.

Submitted: January 10, 1991
Filed: March 20, 1991

Before MAGILL, Circuit Judge, ROSS, Senior Circuit Judge and HUNTER, * Senior District Judge.

HUNTER, Senior District Judge.

This is a class action suit filed by Mark Burris, who alleged that First Financial Corporation ("FFC") and Home Owners

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* The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

Funding Corporation of America ("HOFCA") had charged and were charging Burris and other members of the putative class of mobile home purchasers, finance charges in excess of those permitted by Arkansas law. The Complaint was then amended to add Louis Grider and Lilla Smythe, who also purchased mobile homes and entered into retail installment contracts on form contracts prepared by FFC. Jurisdiction of the district court[1] was invoked under 28 U.S.C. §1332 and under 28 U.S.C. §1331 for claims arising under 18 U.S.C. §1961, *et seq*. Jurisdiction of this Court is invoked under 28 U.S.C. §1291.

Plaintiff Mark Burris purchased a mobile home from and entered into a retail installment sales contract with Smoot Mobile Home Sales of Marmaduke, Arkansas, on May 23, 1984. The installment sales contract was on a form contract prepared by and assigned to FFC. The contract was guaranteed by the Veteran's Administration ("VA") and was subsequently transferred to HOFCA for servicing and other purposes. The contract provided for an interest rate in excess of the Arkansas usury limit.

Grider entered into a purchase agreement and retail installment sales contract with Lochridge Homes, Inc., of North Little Rock, Arkansas, on June 17, 1985. Smythe entered into a manufactured home retail installment sales contract with Crews Mobile Homes of Jacksonville, Arkansas, on September 16, 1985. These contracts were assigned to FFC, but were not guaranteed by the VA nor the Federal Housing Authority ("FHA") and were not transferred to HOFCA.

Defendants moved for summary judgment based on federal preemption and failure to state a claim. The district court granted the motions to dismiss Burris based on determinations that the

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[1] The Honorable Elsijane T. Roy, United States District Court for the Eastern District of Arkansas.

Arkansas usury limit was preempted by provisions of federal law applicable to VA guaranteed loans; that such preemption had not been overridden by Arkansas' adoption of Amendment 60 to its Constitution; and that the VA guaranteed contract was not required to comply with Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") provisions to qualify for federal preemption. The court dismissed the claims of Grider and Smythe as to HOFCA because HOFCA did not hold or service their contracts. The court dismissed the claims of Grider and Smythe against FFC based on a finding that the contracts complied with the provisions of DIDMCA and therefore qualified for federal preemption. From that judgment, plaintiffs appeal. The judgment of the district court is AFFIRMED.

I.

Plaintiff Burris asserts that the district court erred in holding that Arkansas' adoption of Amendment 60[2] in 1982 did not override FHA/VA preemption provisions. The district court correctly held that Arkansas' adoption of Amendment 60 in 1982 did not override FHA/VA preemption provisions.[3] State usury laws limiting the rate of interest which may be charged on FHA insured loans are preempted by 12 U.S.C.A. §1735f-7. State usury laws limiting the rate of interest which may be charged on VA guaranteed loans are preempted by 38 U.S.C.A. §1828.[4] In 1980, shortly after the enactment of the FHA and VA

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[2] Codified at Arkansas Constitution, Art. 19, §13.

[3] This issue relates only to the VA guaranteed contract of Burris and not to the non-FHA/VA guaranteed contracts of Grider and Smythe.

[4] Both statutes were enacted in 1979. The VA preemption statute makes the VA preemption the same as the FHA preemption. S. Rep. No. 260, 96th Cong., 1st Sess. 29, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1915.

preemption statutes, DIDMCA was enacted and codified as amended at 12 U.S.C.A. §1735-f-7. DIDMCA preempts state usury laws limiting the rate of interest which may be charged on not only FHA insured and VA guaranteed loans, but also conventional loans which are "federally related." 12 C.F.R. §590.2(b).

The FHA and VA preemptions apply "to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points or other charges on any such loan, mortgage or advance." 12 U.S.C.A. §1735f-7(b). This is precisely what happened with the adoption of Amendment 60 in 1982:

> The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.

Ark. Const., Art. 19, §13(a)(1). Plaintiff argues that Amendment 60 says it is applicable to "any contract," but, plaintiff, in essence, ignores the remainder of Amendment 60, which states that its provisions "are not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property." Ark. Const., Art. 19, §13(d)(ii).

"The Court determines, given Congress' deference to states' rights to fix their own usury law, * * * that when a state reacts or raises its usury limit on a particular class of loans, it overrides the FHA and VA preemptions for that type of loan in the absence of a contrary statement." *Doyle v. Southern Guaranty Corporation,* 795 F.2d 907, 914 (11th Cir. 1986), *cert. denied*, 484 U.S. 926 (1987). The phrase "in the absence of a contrary statement" is not contrary to the FHA preemption statutes as plaintiff contends. Arkansas specifically stated that its Amendment 60

was not intended to "supersede or otherwise invalidate any provisions of federal law applicable to loans." This provision of Amendment 60 is contrary to an intent to override FHA and VA preemptions.

In *In Re: Lawson Square, Inc.*, 816 F.2d 1236, 1240 (8th Cir. 1987), the court held that Amendment 60 did not override the federal preemption of interest rate limits contained in DIDMCA. The court stated that the legislature and voters of Arkansas had the opportunity to override DIDMCA when they considered Amendment 60 in 1982, but instead of reasserting a State usury limit on mortgage interest rates, that amendment included a section which specifically endorsed the federal preemption. *Id.* The eighth Circuit's reasoning in this DIDMCA case is equally applicable to FHA and VA preemption statutes. Amendment 60 expressly contains a statement "contrary" to the overriding of the FHA and VA preemptions, thus Arkansas' adoption of Amendment 60 did not override the FHA/VA preemption provisions.

II.

Plaintiff Burris contends that the district court erred in holding that creditors need not comply with all of DIDMCA's provisions in order to avail themselves of any of the federal preemption provisions. Plaintiff cites 12 U.S.C. §§1735f-7 and 1735f-5(b) for the proposition that DIDMCA applies to any federally related mortgage loan, and from that plaintiff concludes that it is applicable to FHA and VA loans.[5]

The district court correctly followed *Doyle*, 795 F.2d 907, which plaintiff argues was incorrectly decided, and held that a lender entitled to preemption under the FHA or VA preemption statutes need not comply with DIDMCA regulations. The court noted that the FHA and VA preemption statutes and DIDMCA

[5] This issue related only to the VA guaranteed loan of Burris.

were enacted in a six month time span, and at the time the FHA and VA preemption statutes were enacted, DIDMCA was "well through the congressional committee process. It simply defies reason that Congress would enact one preemption if it were considering a second preemption which would render the first meaningless." This court holds that a lender entitled to preemption under the FHA or VA preemption statute need not comply with the DIDMCA regulations." *Id.*

The Eleventh Circuit traced the legislative history leading up to and following passage of each of the preemption statutes and concluded that:

> although the DIDMCA statute encompasses the "federally related" mobile home loans involved in this case and therefore overlaps with the FHA and VA preemptions, this dual coverage does not nullify the FHA and VA preemptions as applied to mobile home loans. FHA or VA lenders may obtain federal preemption under the respective FHA or VA preemption without also satisfying the DIDMCA requirements * * * * It is unreasonable to believe that Congress, in addressing the more immediate concern of FHA and VA loan availability to individual borrowers, would require the lender to comply with the additional DIDMCA regulations in order to obtain federal preemption * * * * [The Eleventh Circuit noted several following points supporting its holding.] First, Section 529 of DIDMCA repealed certain existing laws but made no mention of the FHA or VA preemption statutes. Second, Section 528 of DIDMCA demonstrates that Congress intended to retain independent vitality in the respective statutory schemes. Finally, a HUD opinion letter supports this interpretation.

Id. at 911-12. The HUD opinion letter referred to in *Doyle, id.* at 912, is an April 1, 1985, letter from Shirley Wiseman, General

Deputy Assistant Secretary of Housing, stating "[i]t was then, and is now, this Department's interpretation of the two preemption laws that they are separate and independent of each other, and that if a manufactured home lender can charge a preemptive interest rate pursuant to 529 of the National Housing Act it need not rely upon Section 501 of the Deregulation Act [DIDMCA], and thus need not comply with 12 C.F.R. 590.4." The holding of the Eleventh Circuit in *Doyle* with respect to this issue is sound and applicable to this case. A lender entitled to preemption under the FHA or VA statutes need not comply with DIDMCA regulations.

III.

Plaintiffs Smythe and Grider contend that the district court erred in holding that the contracts in question complied with three DIDMCA provisions.[6] Plaintiffs assert that the contracts reserve remedies for the creditors which are not permitted by DIDMCA and 12 C.F.R. §590.4(h)(1), which provides, in pertinent part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in Paragraph (h)(2) of this section * * * *

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[6] Because the FHA and VA preemptions were not overridden by Arkansas' adoption of Amendment 60 in 1982 and because a lender entitled to preemption under the FHA and VA preemption statutes need not comply with the DIDMCA regulations, this issue relates only to the conventional loans of Smythe and Grider.

Paragraph 11 of the contract provides:

> If debtor defaults in performing any obligation herein, Creditor after providing Debtor with the notice and opportunity to cure required by applicable statutes or regulations, may accelerate the maturity of any part or all of the amount owing hereunder.

Plaintiffs argue Paragraph 11 does not comply with DIDMCA because 12 C.F.R. §590.4(h)(1) requires creditors to specifically recite the borrower's right to 30 days notice when the contract refers to a notice. Plaintiffs do not argue that the contract must contain a notice, but rather, if it contains a notice, it must specifically recite the borrower's right to 30 days notice. Plaintiffs further argue that this paragraph allows repossession, foreclosure or acceleration without notice.

Neither DIDMCA nor 12 C.F.R. §590.4(h) require the contract to recite the debtor's right to notice. To satisfy 12 C.F.R. §590.4(h) and qualify for federal preemption, a contract need not "contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1071 (11th Cir. 1984), *adhered to, en banc* 764 F.2d 1400 (1985), *cert. denied,* 476 U.S. 1124 (1986). In *Grant v. General Electric Credit Corp.*, 764 F.2d 1404, 1406 (11th Cir. 1985) *cert. denied,* 476 U.S. 1124 (1986), the court held that contract language specifying that "Buyer shall be given notice of right to cure default before Seller is permitted to exercise the right" is sufficient to establish preemption. *See also Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986) and *Atkinson v. General Electric Credit Corp.*, 866 F.2d 396 (11th Cir. 1989), *cert. denied,* 107 L.Ed.2d 31, 110 S. Ct. 64, 58 U.S.L.W. 3213 (1989).

The Federal Home Loan Bank Board, which drafted 12 C.F.R. §590.4(h), agrees that DIDMCA regulations do not require that the debtor's right to 30 days notice be recited in the contract. An

opinion letter of the Board's general counsel dated October 28, 1982, states:

> This requirement [§590.4(h)(1)] refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements [DIDMCA] * * * expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs (d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of §590.4. In light of these considerations, it is the view of this Office that §590.4(h) does not require that the terms of a manufactured home credit sales agreement recite the purchaser's right to thirty days' notice of acceleration or repossession.

5 Fed. Banking L. Rep., Paragraph 82,027 (1983). Paragraph 11 clearly complies with the notice provisions of DIDMCA, in that it refers to applicable statutes and regulations. 12 C.F.R. §590.4(h), which states that no action to repossess or foreclose or to accelerate payment may be taken until 30 days after notice of default has been given, is obviously a regulation contemplated by the contracts in question.

Plaintiffs also assert that the contracts allow repossession, foreclosure or acceleration without notice. Plaintiffs incorrectly reached the conclusion that the contracts do not require notice by ignoring the clause "after providing Debtor with the notice and opportunity to cure required by applicable statutes or regulations" in Paragraph 11. Plaintiffs argue that the phrase "required by applicable statutes or regulations" in Paragraph 11 is similar

to the phrase found objectionable by the Eleventh Circuit in *Quiller*, 727 F.2d 1067.

In *Quiller*, the contract stated that the full balance could become due and payable "without notice," and the creditor could foreclose or repossess "without notice or demand for performance or legal process," and to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." Although the *Quiller* contract required "any notice of right to cure" before acceleration, it also permitted repossession without notice and without any notice of right to cure. The contracts in question never state that actions may be taken without notice. Further, they do not allow the creditor to accelerate, repossess or foreclose without notice. They require notice and opportunity to cure before the creditor may accelerate, repossess or foreclose.

The notice provisions in question are comparable to the notice provisions in *Moyer*, 799 F.2d at 1450, where the Eleventh Circuit found preemption even though the contract did not expressly provide for notice but only that the creditor's rights were "Subject to buyer's Right to Notice of Default and Right to Cure such default, if any." and *Atkinson*, 866 F.2d at 398, where the Eleventh Circuit held that contract language specifying that "Buyer shall be given a notice of right to cure default if required by applicable law" meets DIDMCA requirements.[7]

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[7] Plaintiffs argue that *Moyer* is distinguishable because it specifically stated it was in compliance with federal law, and *Atkinson* is distinguishable because the Court held that the contract was intended to be governed by DIDMCA. Neither DIDMCA nor the regulations implementing it contain any provision which requires the contracts to state on their face that they are federal preemption contracts and that DIDMCA should apply. The contract in *Atkinson* contained a choice of law clause. *Atkinson*, 866 F.2d at 398. The Eleventh Circuit held there was no inconsistency in applying both DIDMCA and Georgia law. The clause "required by applicable statues or regulations" found in the notice provisions of Paragraph 11 of the Plaintiffs' contracts refers to notices required by both DIDMCA and Arkansas law.

Plaintiffs additionally assert that they did not intend that the contracts be governed by DIDMCA. Nowhere in any of the pleadings or materials submitted to the district court is there any statement by plaintiffs that they did not intend their contracts to be governed by DIDMCA. Having failed to raise the issue before the district court, plaintiffs cannot raise the issue for the first time on appeal. *Grant,* 764 F.2d at 1409.

Plaintiffs assert that notices sent to Grider evidence noncompliance of the contracts with DIDMCA.[8] This is inapposite to a determination of whether the contracts reserved for the creditors, remedies on default which were not permitted by DIDMCA and 12 C.F.R. §590.4(h). The district court held, and this court affirms, that the contracts do not reserve remedies for creditors on default not permitted by DIDMCA and 12 C.F.R. §590.4(h).

Plaintiffs assert that the contracts' prepayment provision and disclosures fail to comply with DIDMCA and 12 C.F.R. §590.4(d), which provides:

> A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in the type larger than that used for the body of the document.

Paragraph 9 of the Smythe and Grider contracts provides:

> 9. Prepayment: Debtor may prepay the unpaid balance of this contract in full at any time without penalty, at upon such payment, acceleration, refinancing or consolidation, debtor shall receive a refund credit calculated pursuant to the "actuarial method" after first deducting an acquisition

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[8] The notices in question were sent to Grider and were intended to remind Grider that she was behind in her payments. Further, the notice of default and right to cure required by DIDMCA was sent after the reminder notice.

charge of $50.00 in the event of prepayment. Debtor shall not be entitled to a refund which is less than $1.00.

Plaintiffs contend that because the contract affirmatively specifies the right to prepay in full, it gives the debtor an incomplete disclosure and is misleading and inaccurate. Plaintiffs conclude that the right to prepay "in full or in part" must be stated in the contract for it to qualify for preemption. 12 C.F.R. §590.4(d) requires the right to prepay to be disclosed in the contract. It does not specify that the right to prepay in full or in part must be specified. It does state that the debtor must be able to prepay in full or in part at any time. Here, the debtor was not precluded from prepaying in part at any time. Further, there is nothing in the contract which could be construed as limiting the right to prepay in part. The contract states that the debtor may prepay, pursuant to 12 C.F.R. §590.4(d), but it adds the words "in full." Paying off a loan in part without penalty is implicit from the statement it can be paid off in full without penalty. Defendants have no obligation to inform plaintiffs that they can pay off the loan in part without penalty. Defendants need only tell plaintiffs that they can prepay the loan. *Id.*

Plaintiffs also argue that the acquisition charge of $50 is a prepayment penalty prohibited by 12 C.F.R. §590.4(d). Defendants characterize this charge as a handling charge for the costs associated with releasing the lien on the manufactured home securing the loan.[9] Defendants state that "handling charge" is for costs associated with releasing the lien on the manufactured

[9] Plaintiffs cite *Goldman V. First Federal Savings and Loan Assoc.*, 518 F.2d 1247 (7th Cir. 1975). Here, the Court addressed whether the retention of thirteen days interest after payment of the note in full should be characterized as a penalty. The Court held that "the mere fact that some cost is imposed on the borrower at the time the loan is prepaid does not warrant the conclusion that such cost is a penalty. Thus, for example, the defendant required plaintiffs to pay a fee of $25 for a release deed before canceling the note and

(Footnote 9 continued on next page)

home securing the loan. Thus, because of the nature of the charge, it is not a prepayment penalty. *Goldman,* 518 F.2d at 1252.

Further, the FHA regulations for manufactured home loans includes a prepayment provision, which provides:

> Where the loan is prepaid in full, the lender shall rebate the full unearned interest on the loan, except that a minimum retained ***handling charge*** may be deducted from the rebate if permitted by state or local law. Unearned interest shall be determined in accordance with the actuarial method.

24 C.F.R. §201.17 (emphasis added). Burris, Grider and Smythe's contracts explicitly state that no prepayment penalty will be imposed. The acquisition fee is not a prepayment penalty, but rather, a "handling charge" as contemplated by 24 C.F.R. §201.17.[10] Each of the contracts state that a debtor may prepay the loan without penalty, and the plaintiffs would not have been penalized by prepaying the loan.

Plaintiffs assert that the contract provisions stating that borrowers should see their contract documents for additional information regarding prepayment refunds and penalties violates

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(Footnote 9 Continued)

mortgage." The proper test "is whether there is a charge imposed at the time of prepayment that would not be imposed if the note were paid at maturity instead of at an earlier date. Moreover, the nature of any such charge, rather than its amount, should be determinative." *Id.* at 1252. At oral argument, defendant's attorney assured the court that the $50.00 handling charge was never assessed for partial payments.

[10] Because the Federal Home Loan Bank Board looks for guidance in the FHA regulations, H.R. Conf. Rep. No. 842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 298, 309, it is aware that lenders may deduct a handling charge upon prepayment and, thus, chose not to prohibit such charges upon prepayment.

DIDMCA and 12 C.F.R. §590.4d.[11] The phrase "prepayment refunds and penalties" does not impose a penalty.

Plaintiffs argue that the right to prepay in contracts qualifying for preemption under DIDMCA must be disclosed "in type larger than that used in the body of the document." 12 C.F.R.590.4(d). The Burris contract is a VA guaranteed loan. The VA preemption statute does not require the right to prepay to be in larger type than that used for the body of the contract.

In any event, the purpose of 12 C.F.R. §590.4(d) is to "call attention" to the prepayment provision. *Grant,* 764 F.2d at 1408. At the bottom of the front page of the Burris contract, there is a notice in bold face and in capital letters stating: "Under the law you have the right to pay off in advance the full amount due and obtain a substantial refund of the credit charge." The bold face type is inherently larger than the regular print used in the contract, although not significantly larger so. When the boldface in question is considered with its capital letters, the prepayment provision in question clearly calls to the attention of the debtor the right to prepay.

Plaintiffs further argue that there is another notice provision in all of the contracts which is entirely in bold face and in larger print than the prepayment notices. Even so, the disclosure need not be in the largest type used in the contract but rather must call to the attention of the debtor the right to prepay. *Id.* and 12 C.F.R. §590.4(d). Here, the prepayment notice provisions do call to the attention of the debtor the right to prepay.

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[11] The language Plaintiffs refer to is found in the "federal box" containing disclosures required by the Truth in Lending Act. 16 U.S.C.A. §1601, *et seq.* This disclosure is based on the Credit Sale Model Form, which complies with the Truth in Lending Act. Regulation Z, 12 C.F.R. Part 226 provides that a creditor who uses the Credit Sale Form will be deemed to be in compoliance with Regulation Z.

Plaintiffs next argue that First Financial imposed late charges in amounts greater than that allowed by the contracts, thereby disqualifying the contracts from DIDMCA preemption. The contracts provide that a late charge of "$5.00 or 5% of the payment, whichever is less" will "be collected on any installment past due for a period of more than fifteen (15) days." Plaintiff Grider asserts she was assessed a late charge of $10. This is simply the charge for two accumulated late charges of five dollars, each which plaintiff Grider had not paid.

Further, paragraph 29(c)(3) of plaintiffs' Second Amended Complaint alleges that "the contracts violate provisions of DIDMCA and 12 C.F.R. §590.4(f)." Plaintiffs concede in their brief that the provision in question complies with the Code of Federal Regulations. The notices sent to Grider are simply reminder notices and are not relevant to the issue of whether the contracts violate provisions of DIDMCA concerning late charges. In any event, First Financial did not impose late charges in amounts greater than that allowed by the contracts or DIDMCA.

IV.

Plaintiffs contend that the district court erred in granting Defendants' motions to dismiss and motions for summary judgment. The Federal Rules of Civil Procedure require that a summary judgment "shall be rendered forthwith" when the district court is satisfied that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

Plaintiffs argue that questions of material fact exist because the contracts contained several provisions which were alleged to not comply with DIDMCA. Allegations do not rise to an issue as to a material fact. *Id.* Additionally, plaintiff argues a fact issue is created concerning the conduct of the creditors regarding remedies and the alleged imposition of certain late charges. The district court concluded that the contracts were not violative of

DIDMCA in any respect and this court affirms that holding. There is no genuine issue as to any material fact present in this case. *Id.*

Plaintiffs assert that the district court erred in holding the plaintiffs were not proper class representatives. The district court correctly held:

> Inasmuch as the Court has found that neither Burris, Grider nor Smythe has a cognizable individual claim for relief against either HOFCA or First Financial, none of them may serve as a class representative in a class action suit.

See O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

For the reasons stated above, we AFFIRM.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 90-1677EA

Mark Burris; Louise
Grider; Lilla Smythe,
Appellants,

vs.

First Financial Corporation;
Home Owners Funding
Corporation of America,
Appellees.

Order Denying Petition for
Rehearing with Suggestion for
Rehearing En Banc

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

May 7, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

12 U.S.C. §1735f-7. Exemption from State usury laws

(a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is insured under title I or II of this Act [12 USCS §§1701 et seq., 1707 et seq.].

(b) The provisions of subsection (a) shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after the date of enactment of this section [enacted Dec. 21, 1979]) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

State usury law; mortgages. Act Mar. 31, 1980, P.L. 96-221, Title V, Part A, §501, 94 Stat. 161; Oct. 8, 1980, P. L. 96-399, Title III, §§308(c)(6), 324(a), (e), 94 Stat. 1641, 1647, 1648; Aug. 13, 1981, P.L. 97-35, Title III, Subtitle B, §384, 95 Stat. 432, provides:

"(a)(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges, which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is —

"(A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a

residential cooperative housing corporation or by a first lien on a residential manufactured home;

"(B) made after March 31, 1980; and

"(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b) [12 USC §1735f-5(b)]), except that for the purpose of this section —

"(i) the limitation described in section 527(b)(1) of such Act [12 USCS §1735f-5(b)(1)] that the property must be designed principally for the occupancy of from one to four families shall not apply;

"(ii) the requirement contained in section 527(b)(1) of such Act [12 USCS §1735f-5(b)(1)] that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation or to a loan or credit sale secured by a first lien on a residential manufactured home;

"(iii) the term 'federally related mortgage loan' in section 527(b) of such Act[12 USCS §1735f-5(b)] shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise meets the definitional requirements of section 527(b) of such Act [12 USCS §1735f-5(b)], as those requirements are modified by this section;

"(iv) the term 'residential loans' in section 527(b)(2)(D) of such Act [12 USCS 1735f-5(b)(2)D] shall also include loans or credit sales secured by a first lien on a residential manufactured home;

"(v) the requirement contained in section 527(b)(2)(D) of such act [12 USCS §1735f-5(b)(2)(D)] that a creditor make or invest in loans aggregating more than $1,000,.000 per year shall not apply to a creditor selling residential

manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act [12 USC §1735f-5(b)] or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [15 USCS §1602(f)], as such section was in effect on the day preceding the date of enactment of this title [enacted Mar. 31, 1980], if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

"(vi) the term 'lender' in section 527(b)(2)(A) of such Act [12 USCS §1735f-5(b)(2)(A)] shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [12 USC §§1701 et seq.], and any individual who finances the sale or exchange of residential real property or a residential manufactured home which such individual owns and which such individual occupies or has occupied as his principal residence

"(2)(A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or reserved shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term 'depository institution' means —

"(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [12 USCS §1813];

"(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [12 USCS §1813];

"(iii) any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [12 USCS §1813];

"(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) [12 USCS §1752];

"(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [12 USCS §1422]; and

"(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [12 USCS §1730a].

"(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act [12 USCS §1813], located in the Commonwealth of Puerto Rico.

"(b)(1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

"(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certified that the voters of such State have voted in favor of any provisions, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of subsection (a)(1)

to apply with respect to loans, mortgages, credit sales, and advances made in such State.

"(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to —

"(A) any loan, mortgage, credit sale, or advance which is made after the date such action was taken pursuant to a commitment therefore which was entered during the period beginning on April 1, 1980, and ending on the date on which such State takes such action; and

"(B) any loan, mortgage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

"(4) At any time after the date of enactment of this Act [enacted Mar. 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

"(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall —

"(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

"(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

"(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

"(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

"(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1. The Federal Home Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act [enacted Mar. 31, 1980].

"(e) For the purpose of this section —

"(1) a 'prepayment' occurs upon —

"(A) the refinancing or consolidation of the indebtedness;

"(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

"(C) the entry of a judgment for the indebtedness in favor of the creditor;

"(2) the term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remained is subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

"(3) the term 'precomputed finance charge' means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2) [1`5 USCS §1605(a)(1) and(2)]) as computed by an add-on or discount method; and

"(4) the term 'residential manufactured home' means a mobile home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 [42 USCS §5402(6)] which is used as a residence.

"(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

"(g) This section takes effect on April 1, 1980.".

Prospective amendment of subsec. 501(a)(2) of P. L. 96-221. Under the provisions of 12 USCS §3506, subsec. 501(a)(2) of P. L. 96-221 [note to this section] will be amended by deleting "(A)" and by deleting subpara. (B), effective upon the expiration of 6 years after the date of enactment of 12 USCS §3506 [enacted Mar. 31, 1980].

APPENDIX E

38 U.S.C. §1828. Exemption from State anti-usury provisions.

If, under any law of the United States, loans and mortgages insured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest),m or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter [38 USCS §§1801 et seq.] are also exempt from the application of such provisions.

APPENDIX F

Ark. Const., Art. 19 §13. Maximum lawful rates of interest.

(a) General Loans:

(i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.

(ii) All such contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest. A person who has paid interest in excess of the maximum lawful rate may recover, within the time provided by law, twice the amount of interest paid. It is unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate in effect at the time of the contract, and any person who does so shall be subject to such punishment as may be provided by law.

(b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent (17%) per annum shall be void as to principal and interest and the General Assembly shall prohibit the same by law.

(c) Definitions: As used herein, the term:

(i)"Consumer Loans and Credit sales" means credit extended to a natural person in which the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes.

(ii) "Federal Reserve Discount Rate" means the Federal Reserve Discount Rate on ninety-day commercial paper in effect in the Federal Reserve Bank in the Federal Reserve District in which Arkansas is located.

(d) Miscellaneous:

(i) The rate of interest for contracts in which no rate of interest is agreed upon shall be six percent (6%) per annum.

(ii) The provisions hereof are not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property.

(iii) The provisions hereof revoke all provisions of State law which establish the maximum rate of interest chargeable in the State or which are otherwise inconsistent herewith. [As amended by Const. Amend. 60.]

APPENDIX G

Ark. Code Ann. §18-40-104. Acknowledgment of satisfaction on record.

(a) If any mortgagee, or his executor, administrator, or assignee, shall receive full satisfaction for the amount due on any mortgage, then, at the request of the person making satisfaction, the mortgagee shall acknowledge satisfaction thereof on the margin of the record in which the mortgage is recorded.

(b) Acknowledgment of satisfaction, made as stated in subsection (a) of this section, shall have the effect to release the mortgage, bar all actions brought thereon, and revest in the mortgagor or his legal representatives all title to the mortgaged property.

(c) If any person receiving satisfaction does not, within sixty (60) days after being requested, acknowledge satisfaction as stated in subsection (a) of this section, he shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by a civil action in any court of competent jurisdiction.

APPENDIX H

12 CFR §590.4 Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A "prepayment" occurs upon —

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii) The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term *actuarial method* means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term *precomputed finance charge* means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term *creditor* means any entity covered by this part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.* (1) The provisions of the constitution or the laws of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on a residential mobile home if a creditor covered by this part complies with the consumer protection regulations of this section.

(2) *Relation to state law.* (i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the Office determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the Federal Register and shall operate prospectively.

(ii) Any interested party may petition the Office for a determination that state law requirements are more protective of consumers than the provisions of this section. Petitions shall be sent to: Secretary to the Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, and shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary en-

forcement responsibilities for the subject state law provision, indicating how the state law to be considered offers greater protection to consumers than the Office's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which, is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section, assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section), under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties*. A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments—(1) Federal savings associations*. Federal savings association creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and §545.33(f) of this chapter.

(2) *Other creditors*. All other creditors may enter into agreements with debtors which provide for non-amoritized and partially-amoritized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges*. (1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable state law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable state law does not provide for a lower charge or longer grace period, a late charge on any

installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed the lesser of $5.00 or five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under the State law for such contracts, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees*. (1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii) Disclose each installment or part thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable; and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(h) *Notice before repossession, foreclosure, or acceleration.* (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described in this paragraph (h)(1). The debtor is not entitled to notice of default more than twice in any one year period.

(2) The notice in the following form shall state the nature of the default; the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

To:
Date: , 19

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor

Account number, if any

Brief identification of credit transaction

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. Your default consists of:

DESCRIBE DEFAULT ALLEGED

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

If you have any questions, write (the creditor) at the above address or call (creditor's designated employee) at (telephone number) between the hours of and on (state days of week).

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

APPENDIX I

24 CFR §201.17 Prepayment provision.

The note shall contain a provision permitting full or partial prepayment of the loan. Where the loan is prepaid in full, the lender shall rebate the full unearned interest on the loan, except that a minimum retained handling charge may be deducted from the rebate if permitted by State or local law. Unearned interest shall be determined in accordance with the actuarial method.